STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Leonard Pozner,
Plaintiff-Respondent,

v.

Appeal No. 2020AP121

James Fetzer,
Defendant-Appellant.

Appeal From the Circuit Court of Dane County
Case No. 2018CV3122
Honorable Frank D. Remington, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. INTRODUCTION.

The wheels of justice came off the wagon in this case. The respondent, Leonard Pozner, quotes the 4 exact statements at issue in this case, for which the Appellant, Professor James Fetzer, is adjudged to owe $450,000. These written words constitute Fetzer's entire alleged wrong, for which Pozner claims no medical treatment or expense. He claims no income, wage loss or other compensable damages. How then $450,000? This appeal addresses what went wrong.

Pozner does not seriously rebut the substantive legal arguments Fetzer makes, while engaging in *ipse dixit* reasoning to dispute the relevant facts, such as Pozner's claim that he did not rely on third party threats and harassment as the linchpin of his damages case.

Pozner ultimately tries to justify his money judgment by arguing that conspiracy theorists like Fetzer are vile alt-right persons who should be punished, although Pozner formally dropped any claim for punitive damages at trial. Pozner, nonetheless, seeks to make this case about Fetzer, judged from a perspective that presumes all conspiracies are false.

But not all challenges to main stream narratives prove to be false. Some are proven true, in whole or in part, in the crucible of free and open debate. A presumption of falsity, therefore, even if premised on political expediency, is not justified, especially in a court of law where issues of speech are implicated.

Fetzer simply seeks to be accorded the rule of law applicable to less controversial defendants. This case should not be judged on the basis of one's predisposition. In that event, the judgment of the circuit court should be reversed and remanded for further proceedings.

II. STRUCTURAL ERROR OCCURRED IN THIS CASE INVOLVING FIRST AMENDMENT SPEECH RIGHTS.

The circuit court, early in this case, foreclosed Fetzer from defending on the basis of research establishing that the mainstream Sandy Hook narrative was a cover for a FEMA drill intended to promote gun control. The thesis and the substance of this research bore directly on the truth or falsity of Fetzer's alleged defamatory statements. The court, however, advised the parties that such a defense was "a rabbit hole we won't go down." (*See* Fetzer principal Brief at p. 4, citing R. 303 at 49.) Fetzer, unrepresented at the time, respectfully accepted the court's defense-limiting directive. The court subsequently, at trial, cautioned counsel as well not to go down that road. (R. 311 at 194-96.)

The circuit court's directive constitutes precisely the type of structural error identified in *State v. C.L.K.*, 2019 WI 14, 385 Wis.2d 418,922 N.W.2d 807. (Discussed in Fetzer's principal Brief at p. 19.) Pozner ignores this authority, while arguing that Fetzer was able to present "enough" defense so as to render any error harmless. Structural errors, however, are not reviewed for harmlessness. *Id.* at ¶ 32. The circuit court's directive, therefore, while perhaps expedient in the court's view, constituted reversible error as a matter of law.

Faced with this reality, Pozner argues incorrectly that the structural error doctrine is only applicable to criminal matters. That is not true. In fact, the Wisconsin Supreme Court's decision in *C.L.K.* itself did not involve a criminal matter. The Court, for its part, relied on the United States Supreme Court decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a due process case involving property rights. *Id.* at 2019 WI 14 at ¶17. So too the present case.

The circuit court, in the final analysis, made a structural error by foreclosing consideration of research and evidence showing that Sandy Hook did not occur as reported. The court's error was not an on-the-run mistake at trial. The court's error was integral to the entire proceeding herein.

III. THE CIRCUIT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT WITHOUT CONSIDERING WHETHER DEFENDANT ACTED NEGLIGENTLY.

Pozner misapprehends the *Gertz* constitutional requirement that plaintiff has the burden to prove fault as part of his case-in-chief. In *Denny v. Mertz*, 106 Wis.2d 636, 656, 318 N.W.2d 141 (1982), the Wisconsin Supreme Court implemented *Gertz* by adopting negligence as the necessary standard of fault. As such, proof of negligence is not an affirmative defense that a defendant must plead and prove. It was Pozner's burden to prove the absence of any disputed material fact on summary judgment, including negligence. *Grams v. Boss*, 92 Wis.2d 332, 338, 294 N.W.2d 473 (1980). He did not do so.

Pozner alternatively argues incorrectly that Fetzer waived any negligence requirement by conceding Pozner's status as a private person rather than a public

figure. This concession resolved Pozner's burden to prove actual malice, but that is a different matter than negligence.

Pozner mistakenly conflates malice and negligence. They are distinct concepts with unique elements of proof. Negligence requires proof that the defendant failed to exercise reasonable care. *Id.* at 656. By contrast, actual malice is not determined by whether a reasonably prudent person would have published the challenged statements in suit. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis.2d 524, 542, 563 N.W.2d 472 (1997). Even failure to investigate adequately does not constitute actual malice. *Id.*

Pozner finally argues weakly that the record does not support Fetzer's status as a media defendant. Both parties, however, submitted evidence that Fetzer authored and edited the Book and blog wherein Fetzer's challenged statements were published. Such authorship triggers the constitutional requirement of fault as an element of plaintiff's case-in-chief. Pozner does not argue otherwise or for a different standard of applicability.

The circuit court improperly granted summary judgment, therefore, without the appropriate constitutional showing. *See In re Termination of Parental Rights to Jayton S.*, 216 Wis.2d 1, 18, 629 N.W.2d 768 (2001). The court's later attempt to correct its error *sua sponte* compounded the error by denying Fetzer notice and opportunity to contest negligence, a due process violation in its own right. In response to this procedural unfairness, Pozner lamely argues that Fetzer had an opportunity to contest malice, a different concept altogether.

The circuit court's foray into the negligence issue, as a solo adventurer, also fares poorly as a substantive matter. The court does not carefully address the legal requirements for negligence or the facts of record. On the contrary, the court relies on supposed facts that are not of record, including the supposed falsity of research indicating that Sandy Hook did not occur as reported. (R. 291 at 9.) The court also ignores and dismisses Fetzer's evidentiary submissions supporting his statements at issue. For example, the court disregarded 2 expert reports, by Larry Wickstrom and A.P. Robertson, confirming the lack of authenticity of the death certificate circulated by Pozner. (*See* R. 308 at 156; and R. 143-145 and 147-148.)

The circuit court's *post hoc* discussion of negligence is notably inadequate. The court could hardly have done better, however, given that the negligence issue was not raised or supported by Pozner, nor was Fetzer allowed to respond.

IV. DISPUTED ISSUES OF FACT EXIST AS TO THE FALSITY OF FETZER'S ACCUSED STATEMENTS.

Pozner acknowledges that the factual question regarding the alleged falsity of statements by Fetzer is whether the death certificate Pozner circulated in 2014 was a forgery, fake or fabrication. (Pozner Brief at 25.) Pozner states that "the gist of the defamatory statements in Dr. Fetzer's book and blog is that Mr. Pozner circulated a fake death certificate when he uploaded a copy of that death certificate in 2014." (Pozner Brief at 24.) That is the issue the circuit court confronted on summary judgment. That is also an issue as to which disputed issues of fact exist.

Pozner acknowledges that the death certificate circulated by him is different than other iterations of the death certificate introduced in support of summary judgment. Pozner introduced multiple versions of the death certificate that differ from the death certificate appearing in Fetzer's publications. Pozner contends, however, that the differences are not material and do not support an inference that the death certificate he circulated was not authentic.

Pozner misunderstands the "difference that matters" as to the multiple versions of the death certificate. Fetzer contends that the death certificate circulated by Pozner lacked a narrative certification by the Town Registrar. The death certificate discussed in the book "Nobody Died at Sandy Hook" lacks the Registrar's certification, which is the version published in the Book, as obtained from Ponzer. (*See* R. 86 at 18.) The version of the death certificate attached to Pozner's Complaint, however, includes a narrative certification by the Registrar on the left margin of the document. (R. 86 at 17.) The absence of the narrative certification by the Registrar is the "difference" relevant to summary judgment.

Pozner argues incorrectly that the missing certification relates to an embossed notarization, which he claims is shown on the death certificate from which Fetzer worked. He argues that the embossment is faintly visible on the death certificate that Pozner uplifted and from which Fetzer worked. Pozner's argument, however, misapprehends Fetzer's contention.

The embossed notarization is not the certification missing from the death certificate that Pozner circulated. The version that Pozner circulated lacks the

written narrative certification of the Town Registrar. That narrative certification is totally missing from the death certificate circulated by Pozner, and this omission is not simply a matter of the undetectability of an embossed notary seal.

Pozner undeniably circulated a death certificate that was not certified by the Town Registrar. Connecticut law, moreover, prohibits even a parent from having such an uncertified death certificate, as discussed in Fetzer's brief-in-chief. The authenticity of the death certificate circulated by Pozner, without certification, is certainly an issue of fact.

The circuit court should have treated the authenticity issue as a "disputed" issue of fact. How is it that Pozner came into possession of an uncertified death certificate that he subsequently circulated? Equally important, the effect of a death certificate not certified by the Town Register, from wherever Pozner obtained it, presents a further disputed issue of fact.

The circuit court erred by refusing to draw reasonable inferences regarding authenticity in Fetzer's favor. Compounding the court's error, the court dismissively brushed aside information from Fetzer's experts, *i.e.*, Larry Wickstrom and A.P. Robertson. (R. 143-145 and 147-148.) The court disregarded this evidence as simply "someone else's" opinions, but they were relevant to the question of authenticity. (*See* R. 308 at 156.)

In the end, the question of authenticity is a disputed issue of fact. One could agree with Pozner's explanation, but one could also reasonably infer that Pozner did not satisfactorily explain the lack of certification by the Town

Registrar. This conclusion is all the more reasonable given that Pozner offers no actual explanation for the lack of certification on the death certificate that he circulated. He instead misdirects the argument by focusing on the embossed seal issue, which is not the relevant difference for purposes of summary judgment. Pozner's faint is a red herring.

Summary judgment is not a trial by affidavit. Disputed issues of fact should be resolved by juries and circuit courts should be cautious in granting summary judgment. That is why reasonable inferences must be drawn in favor of the non-moving party. Here, the circuit court did not properly apply summary judgment methodology in granting summary judgment to Pozner on liability.

V. EVIDENCE OF CONTEMPT WAS PREJUDICIALLY ADMITTED.

Pozner also argues unpersuasively that the unprecedented admission of evidence and argument regarding contempt was appropriate. He does not, however, explain how such evidence is relevant to the issue of defamation damages from specific and limited statements, the only issue before the jury. There is no such explanation. In fact, the evidence was admitted for the sole purpose of letting the jury "know the type of person" that is supposedly Professor Fetzer. That purpose, however, has nothing to do with the Ponzer's claimed damages.

Pozner embraces the trial court's initial statement that evidence of contempt was admissible on the issue of punitive damages to show character. Thus, he offers no evidence or argument linking contempt evidence to his damages, instead

arguing that the evidence showed "an ongoing continuous systematic rejection of that system [of how our government continues to run, how this society continues to work]." (R. 313 at 122-123.)

The contempt evidence was improperly allowed for the purpose of inviting the jury to decide this case on the basis of highly prejudicial and inflammatory evidence. That is the very reason the evidence was admitted. It is also precisely why the admissibility of character evidence is so scrupulously guarded against by law and by logic. The prejudice is apparent and reflected in the jury's verdict.

More than a reasonable possibility exists that the erroneous admission of evidence contributed to the outcome of the action at issue. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine the confidence in the outcome.'" *Martindale vs. Ripp*, 246 Wis.2d 67, 89, 629 N.W.2d 698 (2001). Here, moreover, Pozner's evidence of actual compensatory damages is weakly supported by the record and the erroneously admitted evidence was not peripheral to Pozner's theory that Fetzer should be punished by the jury's verdict, even though Pozner abandoned his claim for punitive damages.

The evidence, moreover, is not made relevant by Pozner's baseless claim that Fetzer otherwise abused the litigation process. For example, Pozner unpersuasively complains that Fetzer questioned his identity, despite the fact that he appeared nearly 80 pounds lighter and 20 years younger than available public images of Pozner. (*See* R. 231.) The trial court also admonished Fetzer at trial for respectfully expressing disagreement with the court's summary judgment rulings.

(R. 313 at 74-77.) None of this extraneous argument by Pozner addresses the inadmissibility of prejudicial evidence during the limited trial on damages.

VI. SPEAKER LIABILITY BASED ON THE ACTIONS OF THIRD-PARTIES RAISES CONSTITUTIONAL AND PUBLIC POLICY ISSUES NOT ADDRESSED BY RESPONDENT.

Pozner vainly attempts to disavow his own theory of the case, arguing as a matter of semantics rather than substance. Pozner claims that he never tied his damage claim to actions of third parties purportedly incited by Fetzer's writings, but he did so. As his first witness, Pozner called Dr. Roy Lubit, who testified that Pozner suffered a second post-traumatic stress injury as a result of threats and harassment by third persons, who theoretically were inspired by Fetzer. As detailed in Fetzer's opening Brief, Dr. Lubit repeatedly emphasized threats and harassment by third persons as the basis for his opinions. Pozner's counsel then continued to emphasize throughout the trial, and in argument, that Dr. Lubit was the only expert speaking to the issue of Pozner's alleged damages.

Lest any doubt remain as to his theory of the case, Pozner followed Dr. Lubit with dramatic audio recording of criminal threats by a woman named Lucy Richards. Pozner also offered into evidence written transcriptions of these calls in order to memorialize and imprint the memory. While never linked to Fetzer, Pozner based his damages claim on the intervening actions of such third persons. Incitement was the linchpin of Pozner's damage claim. That substantive reality is not altered, and is not dependent upon, the semantics used. The injury claimed

derives from the threats and harassment, as explicitly argued in closing. (R. 313 at 123.)

Without addressing Fetzer's constitutional and public policy arguments, Pozner alternatively claims that Fetzer waived any objection to the admissibility of evidence of incitement and/or the completeness of instructions given to the jury. Pozner's waiver argument misapprehends Fetzer's concern. The issue is not one of admissibility or insufficiency of jury instruction, but whether Pozner proved incitement, and if so, whether such attenuated liability violates public policy, including that laid down by the United States Supreme Court in *Brandenburg vs. Ohio*, 395 U.S. 444 (1969).

The issue raised is not one of admissibility, jury instruction, or sufficiency of the evidence, but rather constitutional mandate and public policy, which is an issue appropriately addressed post-verdict. Where, as in the present case, the constitution itself requires a showing of particular proof, the circuit court cannot enter the judgment or order without the appropriate showing. *See In re: Termination of Parental Rights to Jayton S.*, 216 Wis.2d 1, 18, 629 N.W.2d 768 (2001).

This Court's analysis of public policy, moreover, assumes that all of the elements of a claim are proved. Sufficiency of the evidence is not the issue from a public policy perspective. Public policy analysis is separate from determining liability under the principles applicable to a particular cause of action. *See Ladewig ex rel. Grischke vs. Tremmel*, 336 Wis.2d 216, 223-24, 802 N.W.2d 511

(Ct.App. 2011). *See also Nichols vs. Progressive Northern Insurance Company*, 308 Wis.2d 17, 31, 746 N.W.2d 220 (2008). Before determining then whether public policy considerations preclude liability, "it is usually the better practice to submit the case to the jury for development of the record." *Ladewig*, 336 Wis.2d 224. The issue is now ripe.

Public policy, undergirded by the First Amendment, weighs against a liberal policy of incitement liability. Casual liability for the uninvited actions of the readers of speech is a dangerous precedent. Pozner dismissively ignores the debate as not worthy of substantive response. Addressing head on the issue of liability for incitement by speech, however, is not haughty or pretentious, and the First Amendment is not merely hortatory or precatory. Speech, and its public policy implications is not an abstract aspiration. The limits on liability for alleged incitement are fundamental to an informed and intellectually vibrant society.

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Liability by incitement is the centerpiece of Pozner's damage claim, and the evidence of third-party threats and/or harassment certainly contributed to the outcome of the present action. *See Martindale vs. Ripp*, 246 Wis.2d 67, 89, 629 N.W.2d 698 (2001). Pozner's evidence, however, does not satisfy constitutional or public policy limitations for such liability, as adopted in Brandenburg. While Pozner suggests that the jury's verdict is sufficiently supported without considering third-party actions, that evidence cannot be parsed out as contributing to the jury's verdict.

VII. CONCLUSION.

The Court of Appeals should reverse the decision of the circuit court; vacate the judgment entered against the Defendant; and remand to the circuit court for further proceedings.

Dated this 17th day of August, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify this Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this Brief is 2,991 words.

Dated this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stats. §809.19(12)(f).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of August, 2020.

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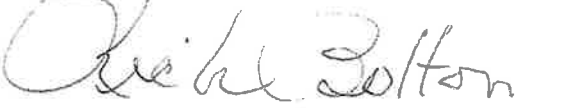

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